Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of GroupMe, Inc./ Skype Communications S.A.R.L, Petition For Expedited Declaratory Ruling	CG Docket No. 02-278

SUPPLEMENT TO THE REPLY COMMENTS OF ROBERT BIGGERSTAFF

GroupMe has now stated that it increased the group size on its service from 25 to 50 cell phone numbers. This highlights the point in my opening comments that reliance on terms of service or other provisions unilaterally in control of miscreants, is no protection at all. Even if GroupMe were unlikely to change its policies (which is proven unlikely) others may not have such a predilection.

There is no legal restriction on the group size or any other terms GroupMe imposes on users (or on itself), as those terms are solely up to GroupMe. Yet GroupMe relies on the "limited" size of the groups in many of its arguments, claiming in essence that the group size limits exploitation of the service. GroupMe repeatedly attempts to distinguish its equipment from predictive dialers based on the capacity of predictive dialers to dial "thousands" of numbers. However, GroupMe's reply comments also reveal that it can, and does, override its own group limit. Nothing stops GroupMe from altering its (current) limit of 50 numbers—or removing it

altogether—at any time in the future. As such, the Commission must not rely on the group size or any other features that are subject to the unilateral discretion of GroupMe.

Contrary to GroupMe's claims, no one is asking for any expansion of the TCPA. Consumers simply want the Commission's existing rules and interpretations left as they are. There is no ambiguity in the Commission's guidance except what is being manufactured by entities for which the TCPA is an impediment to their spamming aspirations. The FCC can regulate an entire category of automated device usage due to the ease or propensity of misuse, in order to prevent evasions of the agency's rules or to further the purposes of the statute. *See Sid Peterson Memorial Hosp. v. Thompson*, 274 F.3d 301, 313 (5th Cir. 2001) ("It is well within the power of an agency to promulgate prophylactic regulations which are broad in scope in order to effectuate the purposes of the enabling legislation."); *Hosp. of Carbondale v. Heckler*, 760 F.2d 771, 782 (7th Cir. 1985)(same); *United States v. O'Hagan*, 521 U.S. 642 (1997) (upholding SEC regulation that prohibited activity not explicitly prohibited by the underlying statute itself).

If any "pecuniary interest" is present in this proceeding, it seems to be placed soundly on the side of GroupMe and similar entities who appear to have adopted business plans based in significant part on violations of existing law. Perhaps bank robber Willie Sutton (1901-1980) should have petitioned the Treasury Department to permit small bank robberies in order to further his business model.

GroupMe's new claim that it only intends to send advertising messages to users of its smartphone app must be taken with a very large grain of salt. If the Petition were granted, and the "equipment" used by GroupMe is not an ATDS (which is what GroupMe argues) then written permission is not needed to send commercial advertising text messages to ANY cell phone with that equipment.[1] GroupMe's own filings stated that 60% of its users do not use the GroupMe app.[2] With free reign to send any text message it wants to any person it wants, why would GroupMe limit text message ads to its app users?[3] I can not imagine GroupMe turning down a doubling in advertising revenue by limiting its ads to the app users.

GroupMe suggests the claims that text messages notifying users of the availability of a free application are solicitations "are equally meritless." Yet throughout the Commission's administration of the TCPA, the Commission has held that a call or message that promotes something that is ostensibly "free" is still a solicitation—particularly when that "free" offer leads to a subsequent solicitation. Now GroupMe has admitted it intends to use its "free" app to deliver ads to the user.

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[1] Purported reliance on subsection 227(c) provisions would fail as entities like GroupMe who want to disabuse cell phone repeatedly claim cell phones are not "residential telephone lines"—particularly when used by a business—and that many exemptions, such as an established business relationship or tax-exempt nonprofit exemptions, that apply to such calls. It would also evade the written permission requirement. Congress excluded those exemptions from the TCPA and the Commission should not pencil them back in. Particularly since the Commission and the FTC just recently vitiated the established business relationship exemption for prerecorded calls.

[2] Petition, at 8.

[3] GroupMe's claim that it only seeks an exemption for noncommercial messages is illogical, since whether a device is, or is not, an ADTS cannot turn on the nature of the message being sent.

That makes their initial message promoting the GroupMe app a solicitation. Once again, their basic business plan seems to come from someone hopelessly naive and unfamiliar with the 20 years of Commission administration of the TCPA and wholly unaware of the Commission's (and consumers') experience with the various schemes that scofflaws have employed in their attempts to evade the TCPA and the Commission's consumer protection efforts.

GroupMe also mistakes canons of statutory construction employed by courts, with the ability of the Commission to interpret a statute which the Commission administers. As is well known in administrative law, agencies have much more latitude in interpreting statutes than courts. Even if a court would construe a statute differently using the canons of construction, the agency is free to adopt any construction not expressly prohibited by the statute. *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39 (1981); *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978); *Train v. NRDC*, 421 U.S. 60, 75 (1975); *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Unemployment Compensation Comm'n v. Aragon*, 329 U.S. 143, 153 (1946); *McLaren v. Fleischer*, 256 U.S. 477, 480-481 (1921).

The most troubling contention of GroupMe is that "in granting the relief requested by GroupMe, the Commission would not be opening the door for spam."[4] Perhaps GroupMe doesn't know what SPAM is, since it fails to erecognize that its

[4] Reply comments of GroupMe.

existing messages for its own app are spam. But one thing what must not be overlooked:

> If the device used by GroupMe to send text messages is not an ATDS under the TCPA (which is what GroupMe has claimed, and would be the result of granting the Petition) **then there is no requirement that the sender get any consent (oral or written) before using that device to send a text message to a million cell phones.**

GroupMe is already sending text message spam—the text messages promoting its "free" advertising delivery application. It is doing so without written permission from the recipient. Instead of granting the relief sought in the Petition, the Commission should issue a citation.

Notably, GroupMe has not rebutted the sound logic that allowing it to rely on representations of permission from its users goes hand-in-hand with requiring it to also accept the consequences of that reliance. That paradigm has been repeatedly recognized by the Commission in its administration of the TCPA, and there is no reason to justify a departure here. The group herders bring more users to GroupMe, and that means more eyeballs for GroupMe's advertisers, which is more revenue for GroupMe. It is eminently appropriate for GroupMe to be a responsible party under these circumstances. The only response GroupMe has to this argument is that it shouldn't have to sue its users when its users violate the TCPA. What that means, is

that the consumer—the real innocent victim here—is left paying for unsolicited messages and chasing a judgment-proof shell while GroupMe keeps the profits that the shell brought to GroupMe. All the profits with none of the liability seems to be the theme. Such unjust enrichment can not form a basis of a permissible business model.

Whether it is cost-shifted "advertising" (including promotion of GroupMe's "free" advertising delivery app) or euphemistically called something else, it is still unsolicited, cost-shifted, and an invasion of personal privacy beyond any other medium. It is prohibited under the Commission's current and long-standing rules and interpretations, and should remain so.

Respectfully submitted, this the 11th day of September, 2012.

/s/ Robert Biggerstaff